

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA	)	
	)	
v.	)	Cr. No. 21-10051-MLW
	)	
MANUEL SANTANA VIZCAINO,	)	
Defendant.	)	

MEMORANDUM AND ORDER

WOLF, D.J.

September 29, 2022

The court has been informed that defendant Manuel Santana Vizcaino's counsel E. Peter Parker, Esq. must begin empanelment in a state court murder case, which is older than this case, on October 6, 2022 and, therefore, he will not be available for the continuation of the September 27, 2022 suppression hearing on or soon after that date, or for the trial in this case previously scheduled for October 11, 2022. It is, however, important that the suppression hearing be completed, and that the court decide the motion to suppress, as soon as reasonably possible.

Therefore, the suppression hearing will resume on October 4, 2022, at 10:30 a.m., and testimony will continue until completed. If Trooper Shawn McIntyre, who tested positive for COVID-19 on September 26, 2022, can safely end isolation in accordance with the Centers for Disease Control and Prevention Guidelines, attached hereto as Exhibit 1, he shall testify in the courtroom. The court is now ordering that the parties shall, by 12:00 noon on September 30, 2022, report whether they agree to take Trooper

McIntyre's testimony by video, if necessary. Even absent an agreement, in the circumstances of this case it is permissible and appropriate for the court to allow Trooper McIntyre to testify by video.<sup>1</sup> The court intends to do so if he cannot safely testify in the courtroom.

In view of the foregoing, it is hereby ORDERED that:

1. The parties shall confer and, by 12:00 noon on September 30, 2022, report whether they agree that Trooper McIntyre's testimony at the suppression hearing may be taken by video if necessary.

2. By 12:00 noon on October 3, 2022:

a. The government shall report whether Trooper McIntyre can safely end isolation and testify in the courtroom on October 4, 2022.

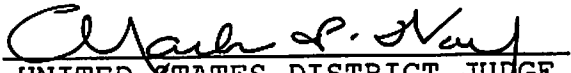
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<sup>1</sup> The First Circuit has stated that the Sixth Amendment "confrontation right has never been extended beyond the context of a trial." United States v. Mitchell-Hunter, 663 F.3d 45, 51 (1st Cir. 2011). But see Kentucky v. Stincer, 107 S. Ct. 2658 (1987). In any event, as courts have found during the COVID-19 pandemic, a defendant's Sixth Amendment rights to counsel and to confront witnesses, and Fifth Amendment due process right to be present are not violated when testimony is taken by video concerning a pretrial motion to suppress. See United States v. Lattimore, 525 F. Supp. 3d 142, 149-51 (D.D.C. 2021); United States v. Rosenschein, 474 F. Supp. 3d 1203, 1208-09 (D.N.M. 2020); United States v. Dinuwelle, 2022 WL 952082, at \*2, \*3 (D.N.M. Mar. 30, 2022); United States v. Gonzalez-McFarlane, 2020 WL 6262968, at \*2 (D.V.I. Oct. 24, 2020); United States v. Lawson, 2020 WL 6110969, at \*2-3 (E.D. Ky. Oct. 16, 2020).

b. Defendant shall file a motion to continue the October 11, 2022 trial.

3. The suppression hearing shall continue on October 4, 2022, at 10:30 a.m., and begin with the testimony of Trooper McIntyre in person or, if necessary, by video.

4. The September 28, 2022 Order is otherwise unaltered.

  
UNITED STATES DISTRICT JUDGE